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No. 20.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.

PETITION OF THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK FOR REHEARING WITH BRIEF IN SUPPORT THEREOF.

JAMES W. NOEL,
ALAN W. BOYD,
Counsel for Petitioner.

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Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS, INDIANA

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PETITION OF THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK FOR REHEARING.

Your petitioner, The Metropolitan Casualty Insurance Company of New York, respectfully presents this its petition for rehearing in the above-entitled cause, and respectfully submits that it has been aggrieved by the opinion and judgment of your Honors rendered herein on the 18th day of March, 1935, in the several respects hereinafter set forth:

1. The court erred in affirming the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause.

2. The court erred in holding that the demurrer of the defendant (your petitioner) to the complaint of the plaintiff (the respondent) was properly overruled by the District Court.

3. The court erred in holding that the demurrer of the plaintiff (the respondent) to the answer of the defendant (your petitioner) was properly sustained by the District Court.

4. The court erred in holding, in effect, that a statute should be sustained, which is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, and upon the face of which no reasonable basis for the classification is apparent.

5. The court erred in holding, in effect, that where a statute is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it is necessary for the challenging party to allege and prove facts which will not only negative all conceivable bases for the classification, but, in addition, will negative bases of which the court does not and cannot conceive.

6. The court erred in holding that there can be any conceivable difference between a foreign insurance company doing business in the State of Indiana and a domestic insurance company of said state, which has any reasonable relation to the classification in question. (Section 9139, Burns' Ann. Stat. 1926, Acts of Indiana, 1865, p. 105.)

7. The court erred in holding that the provision of your petitioner's bond requiring the commencement of an action within fifteen months after the presentation of a claim is rendered invalid by Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105).

8. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), as construed by the Supreme Court of Indiana, is a valid legislative enactment.

9. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), does not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

And your petitioner submits, files herewith, and makes a part hereof, its brief in support of this petition, which it prays your Honors to consider in passing hereon.

WHEREFORE, your petitioner prays your Honors for a rehearing of said cause, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be in all things reversed, and for all other proper relief.

JAMES W. NOEL,
ALAN W. BOYD,
Counsel for Petitioner.

CERTIFICATE.

We hereby certify that we are counsel of record in the above-entitled cause for The Metropolitan Casualty Insurance Company of New York; that we have prepared and read the above and foregoing petition for rehearing, and the brief in support of said petition referred to therein, and made a part thereof; and that said petition is presented in good faith and not for delay.

JAMES W. NOEL,
ALAN W. BOYD,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,
v.
KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.
No. 20.

BRIEF OF THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK IN SUPPORT OF ITS PETITION FOR REHEARING.

The petition for rehearing, filed separately, is as follows (omitting formal parts):

THE PETITION FOR REHEARING.

Your petitioner, The Metropolitan Casualty Insurance Company of New York, respectfully presents this its petition for rehearing in the above-entitled cause, and respectfully submits that it has been aggrieved

by the opinion and judgment of your Honors rendered herein on the 18th day of March, 1935, in the several respects hereinafter set forth:

1. The court erred in affirming the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause.

2. The court erred in holding that the demurrer of the defendant (your petitioner) to the complaint of the plaintiff (the respondent) was properly overruled by the District Court.

3. The court erred in holding that the demurrer of the plaintiff (the respondent) to the answer of the defendant (your petitioner) was properly sustained by the District Court.

4. The court erred in holding, in effect, that a statute should be sustained, which is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, and upon the face of which no reasonable basis for the classification is apparent.

5. The court erred in holding, in effect, that where a statute is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it is necessary for the challenging party to allege and prove facts which will not only negative all conceivable bases for the classification, but, in addition, will negative bases of which the court does not and cannot conceive.

6. The court erred in holding that there can be any conceivable difference between a foreign insurance company doing business in the State of Indiana

and a domestic insurance company of said state, which has any reasonable relation to the classification in question. (Section 9139, Burns' Ann. Stat. 1926, Acts of Indiana, 1865, p. 105.)

7. The court erred in holding that the provision of your petitioner's bond requiring the commencement of an action within fifteen months after the presentation of a claim is rendered invalid by Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105).

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9. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), does not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

And your petitioner submits, files herewith, and makes a part hereof, its brief in support of this petition, which it prays your Honors to consider in passing hereon.

WHEREFORE, your petitioner prays your Honors for a rehearing of said cause, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be in all things reversed, and for all other proper relief.

PETITIONER'S REASONS FOR REHEARING.

The petitioner earnestly urges the court to reconsider its opinion in this cause. Our reasons will be very briefly stated.

At the outset, we assume that the language used on page 3 of the official report of the court's opinion in this case was not intended to convey the impression that if there were a reasonable basis for the classification embodied in the challenged statute in 1865 when it was enacted, the statute should be upheld even though there is no such basis now. Certainly that would not be the law, as this court, speaking through Mr. Justice Brandeis, very recently declared in *Nashville etc. R. Co. v. Walters* (No. 183, decided March 4, 1935; see 79 Lawyers' Edition Advance Opinions, No. 9, page 458, 461). In that case, this court expressly said:

> "A rule to the contrary is settled by the decisions of this court. * * *. A statute valid when enacted may become invalid by change in the conditions to which it is appled."

We think that the court correctly stated the general principles applicable when it said:

> "The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Power Mfg. Co. v. Saunders, supra*, 494. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. *Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U. S. 361, 366; *National Union Fire Insurance*

Co. v. Wanberg, 260 U. S. 71, 75. See *Clarke v. Deckebach*, 274 U. S. 392, 396."

It is in the application of these principles that we feel the court has fallen into error. We particularly wish to call the court's attention to two distinct and independent grounds:

(1) The court's opinion seems to hold that, in order to establish the unconstitutionality of a statute, the challenging party must allege and prove facts which will not only negative all conceivable bases for the classification, but in addition will negative bases of which the court does not and cannot conceive. We submit that such holding is contrary to the previous doctrine of this court, and also that it is unsound.

(2) As a matter of practice, even upon the doctrine of this court's opinion in this case, the demurrer to the defendant's answer should have been overruled, and the defendant permitted to make a case of unconstitutionality upon the proof.

Of these in their order.

THE BASIS FOR THE CLASSIFICATION MUST APPEAR IN THE STATUTE EXAMINED BY THE COURT IN THE LIGHT OF ITS JUDICIAL KNOWLEDGE.

As we understand the court's opinion, the court does not say that there is any basis for the classification here assailed, or that it does, or can, conceive of any basis for the classification. We understand the court to hold, in effect, that the challenging party must demonstrate that there is no conceivable basis there-

for, and further must negative bases of which the court cannot and does not conceive. We think we fairly state the doctrine previously laid down by the court when we say that it has always been considered that to sustain a statute so assailed it must be possible for the court, after taking judicial knowledge of facts of common knowledge, to say that there is a reasonable basis for the classification, and that such basis appears to the court, after taking such judicial knowledge, upon the face of the statute itself.

THE DOCTRINE OF LIGGETT COMPANY V. LEE.

We wish particularly to call attention to the decision of this court in *Liggett Company v. Lee*, 288 U. S. 517, 532-4. That case, like the instant case, arose upon the sufficiency of the pleadings, and not upon the evidence at the trial. The bill of complaint attacked the Florida Chain Store Tax Law, as in violation of the equal protection clause. The plaintiff attempted to distinguish between the Florida law and the Indiana law sustained in *State Board v. Jackson*, 283 U. S. 527, by making numerous allegations of fact, from which it contended that a different conclusion necessarily followed. Mr. Justice Roberts, speaking for the majority, commented on these attempts as follows:

> "In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the Jackson Case was based not upon any single feature of chain store management, but *upon the ultimate fact of common knowledge,*

> *illustrated and emphasized by the evidence*, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental." (Italics ours.)

It will be noted that here the emphasis is altogether on facts of which judicial knowledge is taken, merely "illustrated and emphasized" by the evidence, if any. Under the doctrine of *Liggett Company v. Lee*, facts pleaded or proved could have no other function. They could not be permitted to contradict what the court judicially knows.

In *Liggett Company v. Lee*, this court found the Florida statute unconstitutional on the sole ground that a county line was an unreasonable basis of classification. In passing, we may remark that we think a county line is a basis no less arbitrary than the line between incorporating states, which, under the statute here assailed, determines the time for filing suit. But it is important to note that in *Liggett Company v. Lee*, the court does not refer in its opinion to a single fact alleged in the bill which does not appear upon the face of the statute. In discussing the reasonableness of the classification, the court merely says:

> "* * * but an increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, *finds no foundation in reason or in any fact of business experience.* There is no more reason for adopting the county line as a measure of the.

> tax than there would be for taking ward lines in cities, or arbitrary lines drawn through the state regardless of county boundaries." (Italics ours.)

Here the recognized standard is not the facts alleged or proved, but "reason" and "facts of business experience." The court expressly says:

> "* * * *if any reasonable distinction can be found*, the duty of the court is to sustain the classification embodied in the law. * * * *We are unable to discover any reasonable basis for this classification.*" (Italics ours.)

It seems to us that the precise doctrine which the court adopts in the instant case is the doctrine set forth in Mr. Justice Brandeis' dissenting opinion in *Liggett Company v. Lee*, and concurred in by Mr. Justice Stone. The dissenting opinion calls attention to the precise language of the majority opinion just quoted, and disagrees with it. Mr. Justice Brandeis said (288 U. S. 517, 542-3):

> "For the reasons there stated, the Court sustains like provisions in the Florida statute. But it declares arbitrary, and hence invalid, the novel provision imposing heavier license fees where the multiple stores of a single owner are located in more than one county, *because it is 'unable to discover any reasonable basis for this classification.' There is nothing in the record to show affirmatively that the provision may not be a reasonable one in view of conditions prevailing in Florida.* Since the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute, its validity should, in my opinion, be sustained." (Italics ours.)

While the opinion of this court in this case does not purport to overrule the majority opinion in *Liggett Company v. Lee*, we think that it clearly does so, and adopts the doctrine of the dissenting opinion.

THE MAJORITY DECISION IN LIGGETT COMPANY V. LEE STATES THE ESTABLISHED DOCTRINE.

That the majority opinion in *Liggett Company v. Lee* fairly states the doctrine heretofore adhered to by this court is apparent from a brief examination of several other cases. So, in *Power Manufacturing Co. v. Saunders*, 274 U. S. 490, 493-494, which, like this case, arose upon the pleadings and not upon the trial, the court considered the face of the statute together with the facts judicially known, and said:

> "*We think it very plain that the statutes discriminate* against foreign corporations and in favor of domestic corporations. * * * The opinion of the state court *does not point to any relevant distinction nor have counsel suggested any* * * * *it is apparent that there is no more reason for a state-wide venue* when the action is against a foreign corporation than when it is against a domestic corporation or a natural person." (Italics ours.)

Similarly, in *Liggett Company v. Baldridge*, 278 U. S. 105, 111, a statute requiring stockholders in drug store companies to be registered pharmacists was held unconstitutional. The point of view with which the court approached the question is well illustrated in the following language:

> "If detriment to the public health thereby has resulted or is threatened, *some evidence of it ought to be forthcoming. None has been produced, and so far as we are informed, either by the record or outside of it, none exists.* The claim that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health finally rests upon *conjecture unsupported by anything of substance. This is not enough;* and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment." (Italics ours.)

Here the court says, in effect, that it can see no basis for the classification, and that if there is any, the party defending the statute ought to point it out.

In *Kentucky Finance Corporation v. Paramount etc. Corporation*, 262 U. S. 544, 551, the court said:

> *"There could be no reason* for requiring a corporate resident of Louisville to send its secretary, papers and files and books to Milwaukee for the purposes of an adverse examination that would not equally apply to an individual resident of Louisville in a like case." (Italics ours.)

In *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, 402, the court, after considering the provisions of the statute and taking judicial knowledge of the applicable circumstances, dismissed the classification with this brief comment:

> *"In no view can it be held to have more than an arbitrary basis."* (Italics ours.)

We will not unduly extend this brief by quotations from the decisions of this court which could be multiplied indefinitely.

NEITHER COURT NOR COUNSEL HAVE EVER POINTED OUT ANY POSSIBLE BASIS FOR THE CLASSIFICATION.

Throughout this litigation, it has been quite obvious that it has never been possible for counsel or court to point to any reasonable basis for the classification challenged. Apparently, the General Assembly of the State of Indiana sees none, for at its 1935 session it repealed this statute, and applied the same requirements as to time of bringing suit to both domestic and foreign corporations. (Insurance Code of 1935, Indiana Acts 1935, page ——, not yet published.) In its opinion, the Circuit Court of Appeals indicated that there was one, but made no attempt to point out what it was. In our briefs and upon oral argument before this court, we think we abundantly demonstrated that the suggestion of the Circuit Court of Appeals in this respect is untenable. We challenged counsel to state a single reasonable basis for classification in the mere fact that one insurance company is domestic while the other is foreign. We submit that this challenge was never answered.

The only parts of the opinion of this court which approach the question are the following:

> "We are not told whether, in 1865 when the challenged statute was enacted, or since, differences in the legislative schemes of the state affecting the two classes of casualty insurance companies, foreign and domestic, or differences in their business practices within the state, have or have not made more difficult and time-consuming the collection of claims and the preparations for litigation against foreign in-

surance companies than against domestic companies.

* * *

"There is no showing that the situation of foreign corporations, writing casualty insurance contracts in Indiana, is so similar to that of domestic corporations as to preclude any rational distinction between them as regards the time required for negotiating settlements of claims and the determination whether suits upon them should be prosecuted within or without the state. Where the record is silent, we cannot presume to declare that there is such similarity, or to say that a state is prohibited from making any distinction in the length of time within which suit must be brought. It is not beyond the range of probability that foreign casualty companies, as distinguished from domestic companies, generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state. For aught that appears such is the actual situation."

PETITIONER HAS AT ALL TIMES CONTENDED THAT THERE IS NO CONCEIVABLE BASIS FOR THE CLASSIFICATION, AND HAS DONE ALL IT CAN TO DEMONSTRATE IT.

May we respectfully call attention to the following language in our brief in support of our petition for the writ of certiorari, which we think correctly summarizes our position both on brief and in oral argument:

> "* * * There is nothing about the nature of a foreign corporation admitted to do business in a state that requires a different treatment from domestic corporations or individuals with reference to the right to limit by contract the time for commencement of actions. This court knows judicially the applicable characteristics of foreign corporations and the Indiana statutes with reference to the commencement of actions. There is but one Indiana statute providing for the commencement of civil actions. * * * Under this statute suit is deemed commenced when process is issued and delivered to the proper officer for service. *Marshall v. Matson*, 171 Ind. 238, 244; *Moore-Mansfield etc. Co. v. Indianapolis etc. R. Co.*, 179 Ind. 356, 361. The actual service is not necessary to commencement." (Brief, page 14. The statutes referred to are quoted at length in the appendix to the brief, at pages 20 to 22, inclusive.)

We respectfully submit that at all times we have argued that the prescribed time for suing domestic insurance companies cannot reasonably differ from the prescribed time for suing foreign companies. We submit, further, that we have said all that we can say (assuming that we are correct) when we say that there is nothing in connection with foreign insurance companies that can justify a different regulation in this respect from that applied to domestic companies.

If, on the other hand, we are wrong in this contention, and there is anything to justify the classification, it must be found in some difference between foreign and domestic corporations, which is inherent in the fact that the former derive their corporate powers from a different state, and which affects the ability of

a plaintiff to legally commence a suit against them. Clearly, under the Indiana statutes and decisions cited there is no such difference. We are unable to conceive of what other facts would have a bearing upon the reasonableness of the classification.

IF THERE COULD BE A BASIS FOR THE CLASSIFICATION, THIS COURT WOULD JUDICIALLY KNOW IT.

But, even if, as the court suggests, something to justify the classification might be found in the legislation of the State of Indiana on other subjects, or in the conditions of the insurance business generally, these would all be facts of which this court can and does take judicial knowledge. If we are correct in our contention that there are no such facts, it is logically impossible for us to point them out. If, on the other hand, we are incorrect in our contention, and such facts do exist, they are matters of judicial knowledge, and opposing counsel and the court itself know them as well as do we.

We think the doctrine of this court in this case loses sight of the wide range of subjects of which this court takes judicial knowledge. This court has many times asserted its power and duty, without evidence and in the face of assertions to the contrary, to take judicial notice of facts of common business experience and knowledge, as well as the provisions of applicable state statutes.

Judicial Knowledge of Business Customs and Practices.

So, as to insurance companies, this court takes judicial knowledge of their customs and manner of doing business; the differences between different kinds of insurance, *Supreme Council v. Behrend* (Brandeis, J.) 247 U. S. 394; and the manner of and basis for determining premium rates, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 406; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 241. As an illustration, in *German Alliance Insurance Co. v. Lewis*, this court said:

> "*Indeed, it is a matter of common knowledge* that rates are fixed and accommodated to those standards and classifications in prearranged schedules, and granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. * * * *Indeed, an allegation in the original bill that the superintendent of insurance could not have the requisite technical and mathematical training* to determine whether a basic rate or an actual rate, as applied to any particular risk, was or was not reasonable, and that his conclusion, therefore, 'would be a mere guess or arbitrary determination' *was omitted by an amendment.*" (Italics ours.)

And, generally, this court takes judicial knowledge of a wide range of general business customs and ways of conducting business, *Gibson v. Stevens*, 8 How. 384, 398; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 7; *Louisville Trust Co. v. Louisville, etc., R. Co.*, 174 U. S. 674, 683.

In *Gibson v. Stevens*, the court said:

> "In examining the question between these parties, it is proper to say, that, *if the fact had not been admitted that the dealing* between McQueen & McKay and the plaintiff *was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it.* Apart from the fraud imputed to McQueen & McKay, of which Gibson had no knowledge, the statement of facts in this case describes *the usual course of the great inland commerce* by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and *it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean.*" (Italics ours.)

In *Schollenberger v. Pennsylvania*, the court said:

> "In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? *No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.*" (Italics ours.)

In *Louisville Trust Co. v. Louisville etc. R. Co.*, the court said:

> *"We may not shut our eyes to any facts of common knowledge."* (Italics ours.)

The case of *Brown v. Piper*, 91 U. S. 37, 42, involved facts of scientific knowledge generally known, rather than business customs and practices. But this court well expressed the function of judicial notice, as contrasted with pleading and proof, in language quite as applicable to this case, when it said:

> "The pleadings and proof in the case under consideration are silent as to the ice cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. *The court can take judicial notice of it and give it the same effect as if it had been set up as a defense in the answer and the proof plenary.*" (Italics ours.)

Judicial Knowledge of Statutes of Indiana.

As to state statutes, this court has always taken judicial knowledge of them. *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226; *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Gerling v. Baltimore, etc., R. Co.*, 151 U. S. 673, 678.

In *Fourth National Bank v. Francklyn*, this court criticized the practice in the court below of actually introducing statutes in evidence, as a failure to recognize the doctrine of judicial notice. Over objection, this court considered a statute not so introduced.

Indeed, this court will take judicial knowledge that a statute, assailed as unconstitutional, has been repealed while the suit was pending (as is actually the case with the statute in question in the instant case). *Pure Oil Co. v. Minnesota*, 248 U. S. 158, 163.

THE FACTS JUDICIALLY KNOWN CONCLUSIVELY SHOW THAT THERE CAN BE NO POSSIBLE BASIS FOR THE CLASSIFICATION.

This court judicially knows that under the Indiana practice an action is legally commenced, so as to toll all limitations, when the complaint is filed and summons issued (Burns' Ann. Ind. Stat. 1933, Sec. 2-802; Acts of Indiana 1881, Spec. Sess., p. 240, Sec. 55), that foreign insurance companies doing business within the state are required by law to maintain and do maintain, resident agents for purposes of service (Burns' Ann. Ind. Stat. 1933, Sec. 39-1701, 1707; Acts of Indiana 1865, Spec. Sess., p. 105, Sec. 1; 1877, p. 65, Sec. 1; 1879, p. 551, Sec. 1; 1883, p. 116, Sec. 1), indeed, that service can be legally had upon the Commissioner of Insurance (Burns' Ann. Ind. Stat. 1933, Sec. 39-1707, 1708; Acts of Indiana 1883, p. 116, Secs. 1-2). It necessarily follows that under Indiana law, suit can be commenced, so as to bar the running of any contractual or statutory limitation, as easily against a foreign company as against a domestic company. (See our Brief in Support of Petition for Certiorari, page 15, and statutes quoted at length in Appendix, page 20 *et seq.*)

In its answer in this case, the defendant alleged that at all times while the alleged cause of action was

in existence, the defendant had been transacting business throughout Indiana, had had agents for service of process in practically every county of the state, and had maintained an office for the management of all its Indiana business in the city and county in which suit was actually filed, with agents upon whom, under these laws, service could be had. (Record, p. 19.) It seems to us that these allegations conclusively establish that the defendant was as fully and immediately amenable to suit and process in the plaintiff's action as any domestic company possibly could have been.

As we see it, differences, if any, in: (a) the business practices of the two classes of companies, (b) the difficulty of negotiating settlements with the two classes of companies, and (c) collecting claims and preparing for suits against the two classes of companies, and the mere fact of the necessity, if any, for determining whether the claimant shall sue a foreign company in Indiana or elsewhere, have no conceivable relation to the question of the time within which suit must be brought. They might be quite material as to statutes regulating the contractual limitation of time for giving notice of claim, or regulating the collection of judgments. But it is inconceivable what relation these things have to the time of commencing actions. The claimant is free at any time to file his action, commence his suit and toll the running of the limitation, and he can do it as easily and as quickly against the foreign company as against the domestic company.

Under the doctrine of the court's opinion in this case, how could the defendant ever do any more than it has already done in its answer? If the facts alleged in the answer and judicially known by the court, are

not enough to exclude any possible basis for the classification, what facts could be alleged or proved that would exclude them? If, as we contend, there is no conceivable basis for the classification assailed, what could we do, either by way of allegation or proof, other than to say that there is none?

THE DOCTRINE OF THIS CASE LAYS DOWN AN UNWORKABLE RULE.

In holding, in effect, that the defendant must exclude all conceivable bases, and also bases not conceived or conceivable, it seems to us not only that the court departs from the principles which it has heretofore followed, but that it lays down a rule for determining the constitutionality of statutes which is unworkable, and with which no litigant can possibly comply. These cases usually arise, as here, upon the pleadings. They present to the court a question of law, the solution of which is to be found, not in the facts of any particular case, but in facts generally known, of which the courts can and do take judicial knowledge. Of course, the pleading must present the question by alleging the unconstitutionality of the statute. The opposing party usually files no pleading of fact, but raises the question by a demurrer, as was done in this case. Thus, the court has the question presented to it, and it has before it the statute and the facts of which it can and does take judicial knowledge. These conditions have always been regarded as sufficient to impose upon the court the duty of deciding the constitutionality or unconstitutionality of the statute, not only for that particular case, but for all cases that may thereafter arise. And it seems to us that this duty is not dis-

charged by merely holding that the unconstitutionality of the statute has not been shown.

If, on the other hand, the pleader challenging the statute must allege the facts which the court already judicially knows, and must go farther and prove the non-existence of hypothetical facts, of the existence of which neither he nor the court can conceive, how can counsel discharge that burden. What can he do to enlighten the court, when the court must already know the pertinent facts as well as does he? Must the constitutionality of statutes in every case, regardless of the obviousness of the applicable facts, be tested upon the trial as a question of fact, rather than upon the pleadings as a question of law? And even at the trial, what metaphysical subtleties can be spun to prove the non-existence of the incomprehensible?

We think that these questions can be satisfactorily answered only by adhering to the doctrine that where a classification is challenged as arbitrary and unconstitutional, the court should consider it in the light of the facts judicially known, and that unless some reasonable basis for the classification can be seen and pointed out, upon the face of the statute, the statute must fall. If this court had been able to see such a basis in this case, it would undoubtedly have stated it in its opinion. Certainly, no one else would be better qualified by legal learning and general knowledge to point it out. As to ourselves, we cannot find it or conceive of it.

THE DEMURRER TO DEFENDANT'S ANSWER SHOULD HAVE BEEN OVERRULED.

In any event, however, even on the basis of the court's opinion in this case, we think it quite clear that the case should have been reversed, with instructions to overrule the demurrer to the defendant's answer. The court will recall that the petitioner (the defendant in the trial court) presented this question twice, once by demurrer to the plaintiff's complaint, which showed upon its face that the action was brought after the period of limitation contained in the bond, and thereafter by special answer, which alleged the unconstitutionality of the statute as in violation of the Equal Protection Clause of the Fourteenth Amendment.

Certain allegations of the answer have already been summarized (*supra*, p. 22).

The answer further alleged:

> "That such statute so [construed] constitutes an unreasonable and arbitrary discrimination against this defendant and all other companies organized under the laws of states other than Indiana and transacting a casualty insurance and fidelity bond business in the State of Indiana, and imposes burdens not imposed upon Indiana corporations transacting the same kind and class of business, and denies to defendant and others similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. That by reason thereof said statute of the State of Indiana is invalid and void and cannot and does not invalidate the provisions of the bond sued on." (Record, p. 19.)

The doctrine of this court in this case requires the challenging party to show facts and the non-existence of other facts pertinent to the reasonableness of the classification. Now, certainly, the quoted part of the defendant's answer alleges, as an ultimate fact, everything which it is necessary to allege in order to enable the defendant to make the factual showing required by that doctrine. If it is a conclusion, it is a conclusion of the evidentiary facts implied thereby and necessary to support it. Under the Indiana practice, the plaintiff's only remedy against such a conclusion is to move to require the defendants to state such facts.

The Indiana statute expressly provides:

> "Hereafter, in all pleadings * * * in any civil * * * case * * * all conclusions of fact stated therein shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of such pleading. * * * *Provided*, That as against such conclusion only the following remedy is given, that a motion may be made to require the party filing such pleading * * * to state the facts necessary to sustain the conclusion alleged, said motion setting out wherein such pleading * * * is insufficient. If no such motion is made and ruled upon, all objections on account thereof are waived." (Burns' Ann. Ind. Stat. 1933, Sec. 2-1005; Indiana Acts 1913, p. 850, Sec. 1; 1915, p. 123, Sec. 1; statute construed and applied by the Supreme Court of Indiana in *Fauvre Coal Co. v. Kushner*, 188 Ind. 314.)

The plaintiff filed no such motion, but demurred to the answer without challenging the conclusion, if such it was. The answer, therefore, cannot be questioned on the ground that it alleges conclusions. It is certainly broad enough to permit the defendant on the trial to introduce any evidence whatever, if evidence is necessary, to show the unreasonableness of the classification challenged.

THE COURT'S DECISION IN EFFECT DENIES PETITIONER THE OPPORTUNITY TO SHOW THE UNCONSTITUTIONALITY OF THE STATUTE.

With deference, we think that this court has inadvertently overlooked the fact that in unconditionally affirming the decisions of the Circuit Court of Appeals and of the District Court, it has denied us the right to show that the statute is unconstitutional. IT MUST BE REMEMBERED THAT THIS COURT'S OPINION DOES NOT HOLD THAT THE ACT IS CONSTITUTIONAL; IT MERELY HOLDS THAT THE PETITIONER HAS NOT SHOWN THAT IT IS UNCONSTITUTIONAL. But the defendant's answer was its first opportunity to show this in the manner in which the Supreme Court now holds it must be shown. It was sufficient under the Indiana practice to show it, if it could be shown. THE COURT SUSTAINED THE PLAINTIFF'S DEMURRER TO THIS ANSWER. THE LEGAL EFFECT OF THIS RULING WAS TO HOLD AS A MATTER OF LAW THAT THE ACT IS CONSTITUTIONAL, AND TO DENY THE DEFENDANT THE RIGHT TO SHOW THAT IT IS UNCONSTITUTIONAL. The defend-

ant had done all it could do to present the question of the unconstitutionality of the statute. Obviously, it could not plead further to present the question, and it had no other course but to refuse to do so. Upon such refusal, the court entered judgment for the plaintiff. UPON THAT JUDGMENT, THE ACT IS HELD CONSTITUTIONAL AS A MATTER OF LAW, AND IT IS THAT JUDGMENT WHICH IS HERE AFFIRMED, ALTHOUGH THIS COURT SAYS IN EFFECT THAT IT DOES NOT KNOW WHETHER THE ACT IS UNCONSTITUTIONAL OR NOT.

Obviously, whatever should have been the court's ruling upon the demurrer to the complaint, the court should not have sustained the demurrer to the answer. In so doing, the trial court made it impossible for the defendant to introduce evidence to meet the requirements which the Supreme Court now lays down for parties challenging the constitutionality of legislative acts. Upon the trial, the defendant might be able to introduce evidence upon which this court would have to hold that the classification is arbitrary and unconstitutional. It should not be denied this opportunity. Regardless of whether the court erred in overruling defendant's demurrer to the complaint, it necessarily erred in sustaining plaintiff's demurrer to defendant's answer. Therefore, this court should not affirm the judgment.

CONCLUSION AND SIGNATURES.

We respectfully submit, therefore, that the case should be reversed, and that in any event the court should reverse the case with instructions to overrule

the demurrer to defendant's answer, so that the case can proceed to trial, and a record can be made upon which this court can finally pass upon the constitutionality of the statute here challenged.

Respectfully submitted,

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